Supreme Court, U. S.
FILED
NOV 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN MCCARTHY,

Appellants,

—v.—

COMMONWEALTH OF VIRGINIA,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN MCCARTHY,

Appellants,

—v.—

RICHARD H.C. TAYLOR,

Appellee.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA AS *AMICI CURIAE*

EDNA D. WELLS
BRUCE J. ENNIS
c/o American Civil Liberties Union
22 East 40th Street
New York, New York 10016
(212) 725-1222

STEPHEN BRICKER
c/o American Civil Liberties Union of Virginia
1001 East Main Street
Richmond, Virginia 23219
(804) 644-8022

Attorneys for Amici Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
INTEREST OF AMICI	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. GANNETT v. DePASQUALE SHOULD BE OVERRULED OR EXPRESSLY LIMITED TO ITS FACTS, WHICH INVOLVED ONLY CLOSURE OF PRE-TRIAL SUPPRESSION PROCEEDINGS, UPON THE CONSENT OF BOTH PARTIES.	8
A. The Public and the Press Have a Constitutionally Protected Right of Access to Criminal Pre-Trial and Trial Proceedings. .	9
B. Gannett Should Not Be Extended to Authorize Closure of Criminal Trials	16
1. Gannett should be limited to its facts	16
2. Access to trials poses substantially fewer risks to defendant's constitutional rights than does access to pre-trial suppression hearings. . . .	21

Page

3. During trials, judges have available many alternatives for protecting defendant's rights that are less drastic than closure of the entire trial. . . 23

II. EVEN ABSENT A CONSTITUTIONAL RIGHT OF PUBLIC ACCESS, THE PUBLIC HAS A SUFFICIENT INTEREST IN PUBLIC TRIALS TO REQUIRE THE EXPRESS CONSENT OF THE PROSECUTOR TO A CLOSURE MOTION 27

CONCLUSION. 31

TABLE OF AUTHORITIES

Cases	Pages
Corfield v. Coryell, 4 Wash. CC 371 (1825)	13
Cox Broadcasting Corp. v. Cohn 420 U.S. 469 (1975)	27
Craig v. Harney, 331 U.S. 367 (1947)	8
Edwards v. California, 314 U.S. 160 (1941)	13
Gannett v. DePasquale, 61 L.Ed.2d 608 (1979)	Passim
Geise v. United States, 262 F.2d 151 (9th Cir., 1958)	25
Griswold v. Connecticut, 381 U.S. 479 (1965)	12
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)	12
Harris v. New York, 401 U.S. 222 (1971)	16,17
Houchins v. KQED, 438 U.S. 1 (1978)	13,14
In Re Winship, 397 U.S. 358 (1970)	11
Irvin v. Dowd, 366 U.S. 717 (1961)	25

Cases	Pages
Kent v. Dulles, 357 U.S. 116 (1958)	13
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)	27
Miranda v. Arizona, 384 U.S. 436 (1966)	17
Mullaney v. Wilbur, 421 U.S. 684 (1975)	11
Murphy v. Florida, 421 U.S. 794 (1975)	25
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)	3,24,25
Sheppard v. Maxwell, 384 U.S. 333 (1966)	3,25
Singer v. United States, 380 U.S. 24 (1965)	29
United States v. Guest, 383 U.S. 745 (1966)	12,13
United States v. Holovachka, 314 F.2d 345 (7th Cir.), cert. denied, 374 U.S. 809 (1963)	25
Westchester Rockland Newspapers, Inc. v. Leggett, 99 N.Y.L.J. 1 (Nov. 23, 1979)	18

Constitutional Provisions	Pages
First Amendment	Passim
Fifth Amendment	13
Sixth Amendment	Passim
Fourteenth Amendment	Passim
Statutes and Rules	
New York Criminal Procedure Law §§320.10, 340.40 (McKinneys, 1971)	29
Virginia Code §19.2-266	4
Fed.R.Crim.Pro. 29,33,47,48	26
Other Authorities	
Fenner and Skoley, "Rights of the Press and the Closed Court Criminal Proceeding," 57 Neb. L.Rev. 442 (1978)	24
Richmond Newspapers, Inc. v. Virginia, No. 79-243, Jurisdictional Statement	3,5,30
Richmond Newspapers, Inc. v. Virginia, No. 79-243, Brief of the Reporter's Committee for Freedom of the Press, Amicus Curiae	9

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, AND KEVIN McCARTHY,

Appellants,

-v.-

COMMONWEALTH OF VIRGINIA,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, AND KEVIN McCARTHY,

Appellants,

-v.-

RICHARD H.C. TAYLOR,

Appellee.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA AS AMICI CURIAE

Interest of Amici*

For 59 years, the American Civil

---

* The parties have agreed to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of the Court.

Liberties Union and its state affiliates, including amicus ACLU of Virginia, have been dedicated to the protection of civil liberties through a vigorous defense of the safeguards embodied in the American Constitution.

The present case is of particular interest to the ACLU and the ACLU of Virginia because the decision of the Virginia Supreme Court threatens the continued vitality of one such safeguard - the public trial. Public trials have been an integral part of American society. They have played an indispensable role in our history as a check on the uses and abuses of the awesome power of the criminal law. In order to preserve this tradition of public trials, the ACLU and the New York Civil Liberties Union participated as amici curiae urging reconsideration and reversal of the decision in Gannett v. DePasquale, 61 L.Ed. 2d 608 (1979), and the ACLU and the ACLU of Virginia urged the Court to hear the instant case on the merits in an amicus brief filed in support of the jurisdictional statement - a step rarely taken by the ACLU.

Insofar as this case is perceived as an opportunity to accomodate public and

individual rights, the ACLU's brief supporting the rights of the defendant to a verdict untainted by prejudicial publicity, Sheppard v. Maxwell, 384 U.S. 333 (1966), for example, and its brief urging the invalidity of a prior restraint in the context of an ongoing criminal proceeding, Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), place amici in a unique position to aid the Court in striking an appropriate balance.

STATEMENT OF THE CASE

The facts of the case appear undisputed. On or about September 11, 1978, the appellee, Honorable Richard H. C. Taylor, granted defendant's motion to exclude the public and the press from his fourth trial for an alleged murder. In support of the motion, defense counsel asserted that closure was necessary to prevent "any information being shuffled back and forth when we have a recess as to what-who testified to what." Appellants' Brief in Support of the Jurisdictional Statement, App. D. at 7a. The prosecutor acquiesced, noting that the matter was within the judge's discretion.

Pursuant to Virginia Code §19.2-266, which provides that the court may "in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial. . .," the trial judge closed the entire trial to everyone (including appellants Wheeler and McCarthy, two reporters of appellant Richmond Newspapers), except testifying witnesses.

No factual determination was made concerning (1) the extent of the threat, if any, posed to defendant's fair trial rights by the presence of the press and public, (2) the existence of any previous or potentially prejudicial pre-trial publicity, or (3) the availability of less drastic alternatives to protect the rights of the defendant.

Upon the request of counsel for appellants, the court scheduled a hearing on its closure order. Appellants argued that the First, Sixth, and Fourteenth Amendments required the trial to be open, and that the court had to utilize other available measures, short of closure, to protect defendant's rights. The defense attorney reiterated his concerns about "leaks" and attempted to

justify closure as the only available option.

At the conclusion of the arguments, the trial judge, commenting that "having people in the Courtroom is distracting to the jury," continued his closure order. Appellants' Brief at App. E at 9a. The trial ended two days later. A one-page order was entered sustaining the defendant's motion to strike the government's evidence "on the grounds stated in the record." The court found the defendant "not guilty of murder, as charged in the indictment," and released him. Id. at App. N.

On appeal, the Virginia Supreme Court affirmed the closure order, citing only Gannett v. DePasquale, 61 L.Ed.2d 608 (1979), as authority for closure.

SUMMARY OF ARGUMENT

Gannett v. DePasquale, 61 L.Ed.2d 608 (1979) (hereafter, "Gannett"), should be overruled or expressly limited to its facts, which involved only closure of pre-trial suppression proceedings upon the consent of both parties. Point I.

Whether the source of the right is the First Amendment, the Sixth Amendment, or the

"four corners of the Constitution itself," the Court should expressly acknowledge that the public and the press have a constitutionally protected right of access to criminal trials and pre-trial proceedings. Point I.A.

Like most constitutional rights, that right is not absolute. But it can be limited only if necessary to protect a competing constitutional right of a defendant, or, perhaps, if necessary to further a compelling governmental interest in the administration of justice.

Gannett should not be extended to authorize closure of criminal trials. Point I.B. It should be limited to its facts, which involved only pre-trial suppression proceedings. Point I.B.1. Public access to trials poses substantially fewer risks to defendant's constitutional rights than does access to pre-trial suppression proceedings. Point I.B.2. And there are many alternatives to closure that can be utilized during trial to protect a defendant's constitutional rights. Point I.B.3.

Finally, even if the public does not

have a constitutionally protected right of access, a defendant should not ordinarily be able to waive a public trial without the express consent of the prosecutor. Point II.

Public and press access to criminal trials and proceedings should therefore be presumed. This presumption may only be overcome by a finding of the trial court, upon adequate evidence, that the defendant has carried his burden of proving closure is necessary because there is a "substantial probability that irreparable damage to his fair trial will result from an open procedure," that alternatives to closure will not protect his constitutional rights, and that closure will be effective.

Those findings were not made in this case. Accordingly, the judgment below should be reversed.

I. GANNETT SHOULD BE OVERRULED OR EXPRESSLY LIMITED TO ITS FACTS, WHICH INVOLVED ONLY CLOSURE OF PRE-TRIAL SUPPRESSION PROCEEDINGS, UPON THE CONSENT OF BOTH PARTIES.

"A trial is a public event. What transpires in the courtroom is public property." Craig v. Harney, 331, U.S. 367 at 374 (1947). That statement reflects a 200-year-old tradition supporting public trials as fundamental to the fair and efficient administration of justice and to the effective operation of a democratic society. However, in the five months since this Court decided Gannett, there has been widespread (although understandable) uncertainty as to the continuing vitality of that tradition. As a consequence of this uncertainty, courts have interpreted Gannett to sanction closure of almost every step in the criminal justice process, from arraignment, through jury voir dire, to post-conviction hearings;

and several courts, including the Virginia Supreme Court below, have interpreted Gannett as authorizing closure of the entire criminal trial.[1/]

A. The Public and the Press Have a Constitutionally Protected Right of Access to Criminal Pre-Trial and Trial Proceedings.

Gannett has been widely understood as holding that the public and the press do not have any constitutionally protected right of access to criminal pre-trial proceedings. That is not what the Court held. Although five justices found that the Sixth Amendment does not protect such public access, neither the majority nor the dissent foreclosed the possibility that the First Amendment protects such public access - a question which both the majority and the dissent expressly left open.[2/] Actually, although

---

1/ See Brief of Reporter's Committee For Freedom of the Press in Support of Jurisdictional Statement, Amicus Curiae, and Appendices.

2/ 61 L.Ed.2d at 629, 664.

they did not agree upon the source of the right, five justices expressly found that the public and the press have a constitutionally protected right of access even to pre-trial suppression hearings. Justice Powell, concurring, found the source of that right in the First Amendment.[3/] Justice Blackmun, with Justices Brennan, White, and Marshall concurring in his dissent, found the source of that right in the

---

3/ Justice Powell stated: "Although I join the opinion of the Court, I would address the question that it reserves. Because of the importance of the public's having accurate information concerning the operation of its criminal justice system, I would hold explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments in being present at the pre-trial suppression hearing. As I have argued in Saxbe v. Washington Post Co. [citations omitted], this constitutional protection derives not from any special status of members of the press, but rather because ' [i]n seeking out the news the press...acts as an agent of the public-at-large,...'" 61 L.Ed.2d at 632 (ellipsis in original).

Sixth Amendment.[4/] It follows, a fortiori, that the public and the press have a constitutionally protected right of access to criminal trials.[5/]

The Court, on prior occasions, has acknowledged the existence of constitutionally protected rights that are not expressly mentioned in the Constitution, or whose specific source was unsettled. For example, this Court recognized a right not to be convicted without proof beyond a reasonable doubt, Mullaney v. Wilbur, 421 U.S. 684 (1975), and In Re Winship, 397 U.S. 358 (1970); a right of privacy,

---

4/ Justice Blackmun stated: "I therefore conclude that the Due Process Clause of the Fourteenth Amendment, insofar as it incorporates the public trial provision of the Sixth Amendment, prohibits the States from excluding the public from a proceeding within the ambit of the Sixth Amendment's guarantee. . ." 61 L.Ed.2d at 655.

5/ Although this case involves only closure of the trial, amici contend that the public right of access extends to all phases of criminal proceedings traditionally open to the public.

Griswold v. Connecticut, 381 U.S. 479 (1965); a right to vote in state elections, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); and a right to travel interstate, United States v. Guest, 383 U.S. 745 (1966).

The Guest case is illustrative. Six defendants were indicted for criminal conspiracy to deprive black citizens of the free exercise and enjoyment of several specified rights secured by the Federal Constitution, including a conspiracy to deprive black citizens of "the right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia." 383 U.S. at 757. The district court dismissed this count for failure to state an offense against rights secured by the Constitution.

This Court reversed. In reviewing the possible constitutional sources of a right to travel, the Court found that: "although the Articles of Confederation provided that 'the people of each State shall have free ingress and regress to and from any other State,' that right finds no explicit mention in the Constitution." Id. at 758. Suggested sources of the right were the Privileges and

Immunities Clause of the Fourteenth Amendment, Corfield v. Coryell, 4 Wash. CC 371 (1825), the Commerce Clause, Edwards v. California, 314 U.S. 160 (1941), and the Due Process Clause of the Fifth Amendment, Kent v. Dulles, 357 U.S. 116 (1958). Nevertheless, the Court acknowledged the existence of a constitutionally protected right to travel despite the "recurring differences within this Court as to [its] source. . . ." Id. at 759. The fact that "all have agreed that the right exists" was deemed sufficient to acknowledge the right, apparently even if there were no agreement among a majority of the Court concerning the specific source of the right. Id.

As noted, in Gannett Justices Blackmun, Brennan, White, and Marshall agreed that the Sixth Amendment protects public and press access even to pre-trial suppression proceedings. Justice Powell, concurring, found that right protected by the First Amendment. And given Justice Stevens' views in Houchins v. KQED, 438 U.S. 1 (1978),[6/] where he found a First

---

6/ Justice Stevens, with whom Justices Brennan and Powell joined, stated that the First Amendment protects not only the dis-
(FN 6 continued on next page)

Amendment right of access to county jails, it is reasonable to conclude he would find that public and press access to criminal trials is presumptively protected by the First Amendment. Thus, although there is disagreement about its source, at least six Justices agree that public and press access to criminal pre-trial and trial proceedings

---

semination but also the receipt of information and ideas. "Without some protection for the acquisition of information about the operation of public institutions. . . by the public-at-large, the process of self-governance contemplated by the Framers would be stripped of its substance [and] [f]or that reason information gathering is entitled to some measure of constitutional protection." Houchins at 32. Under this analysis, access to the courtroom must be considered a correlative right to the right of the public to receive information. Amici do not contend that this correlative right requires recognition of a special privilege to the public to have access to places which have traditionally been closed, or that the right of public access to information is unqualified. But where governmental functions have traditionally been conducted in public or are public by their very nature, those functions should be considered presumptively open to the public.

is presumptively protected by the Constitution.

Accordingly, amici believe that, properly understood, Gannett did not preclude a constitutionally protected right of public and press access even to pre-trial suppression hearings. But even if we are wrong, there are strong reasons opposing the extention of Gannett's pre-trial ruling to preclude a constitutionally protected right of public and press access to criminal trials.

B. Gannett Should Not Be Extended to Authorize Closure of Criminal Trials.

Although the facts of Gannett involved only a pre-trial suppression hearing, and although the majority opinion began by phrasing the issue to be decided as whether members of the public have an independent constitutional right to insist upon access to a pre-trial proceeding," (61 L. Ed.2d at 616), the concluding language in the majority opinion is much broader: "[W]e hold that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." Id. at 628 (emphasis added).

It is therefore appropriate that the actual holding in Gannett be clarified.

1. Gannett should be limited to its facts.

Decisions are traditionally clarified by the case-by-case method of limiting every holding to its particular facts, with all language not necessary to the resolution of the narrow issue posed by those facts considered dicta. See Harris v. New York, 401

U.S. 222, 224 (1971).[7]

The facts material and necessary to the Gannett decision, and in whose absence Gannett should not be deemed controlling, were as follows:

(a) Gannett involved a pre-trial motion to suppress an allegedly involuntary confession and certain physical evidence. The distinctions between pre-trial suppression hearings and trial or post-trial proceedings are not simply technical distinctions, but substantive differences.[8]

---

7. In Harris, this Court, in holding that statements obtained in violation of Miranda v. Arizona may be used for impeachment purposes, found the Miranda language ("statements...used to impeach testimony...are incriminating and may not be used without full warnings and effective waiver") to be unnecessary to the Miranda decision, and therefore not controlling. Harris v. New York, 401 U.S. at 224.

8. The majority in Gannett emphasized the "special risks" posed by pre-trial suppression hearings, whose "whole purpose...is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury." 61 L.Ed.2d at 620.

For example, there are many alternatives less drastic than closure that are available during a trial, including sequestration of the jury (see discussion infra), that are not available in pre-trial proceedings. And pre-trial proceedings, other than suppression hearings, pose substantially less risk to a defendant's constitutional rights because public knowledge of the contents of those proceedings is far less likely to prejudice prospective jurors. Thus, arraignments, most bail proceedings, and determinations of a defendant's mental competence to stand trial are qualitatively different from pre-trial motions to suppress evidence.[9/]

---

9. Indeed, the same New York State Court of Appeals which authorized closure in Gannett subsequently limited Gannett to pre-trial suppression proceedings, and ruled unanimously that determinations of competence to stand trial should be open to the public and the press. Westchester Rockland Newspapers, Inc. v. Leggett, 99 N.Y.L.J. 1 (Nov. 23, 1979).

(b) The trial court in Gannett found on the record that an open hearing would pose a "reasonable probability of prejudice to these defendants." 61 L.Ed. 2d at 629. It was probable that the press would provide extensive coverage of the suppression hearing and that the coverage would reach a substantial percentage of potential jurors. The majority in Gannett thought it important to describe at length the extent of the previous publicity about the case (id. at 616-619), and to note defense counsel's contention that "the unabated buildup of adverse publicity" had already "jeopardized the ability of the defendants to receive a fair trial." Id. at 619. The majority apparently thought the trial judge could reasonably conclude that a substantial number of potential jurors, whose interest in the case had been whetted by previous publicity, would read any press coverage of the suppression hearing, and that such a hearing would generate inadmissible and highly prejudicial information about alleged confessions and defendants' possession of the alleged murder weapon. Thus, Gannett involved a judicial finding of probable prejudice to

a defendant, and that finding was based on adequate evidence.

(c) The Gannett majority stressed repeatedly that the defendant had requested closure, and the prosecutor had consented. Id. at 619, 630. Justice Powell, concurring, also noted that the prosecutor "had endorsed the closure motion." Id. at 635. Thus, Gannett is not authority for closure over the objection of the prosecutor.[10/]

(d) Finally, the majority in Gannett stressed that no member of the public or the press had made "a contemporaneous objection" to closure. Id. at 629. And Justice Powell, concurring, emphasized the strong practical

---

10. It is conceivable, though unlikely (see Point II, infra), that a court could properly order closure over a prosecutor's objection if closure were deemed necessary to protect defendant's constitutional rights, but the objection of a prosecutor would almost always preclude closure on any other ground. If the prosecutor does not believe closure is necessary to further a compelling governmental interest, such as protecting the identity of a confidential informer, it is unlikely that a finding of necessity for closure would be justified.

reasons requiring a "timely objection" by persons "actually present at the time the motion for closure is made...." Id. at 634-5.

Thus, properly understood, Gannett held only that the public and the press can be excluded from a pre-trial suppression hearing when the trial judge finds, upon adequate evidence, that closure is necessary to prevent a reasonable probability of prejudice to a defendant's constitutional rights, when the defendant and the prosecutor consent to closure, and when there is no contemporaneous objection to closure by the public or the press. Closure in any other circumstances, as in the instant case, would constitute an unwarranted extension of the holding in Gannett.

2. Access to trials poses substantially fewer risks to defendant's constitutional rights than does access to pre-trial suppression hearings.

It is very unlikely that it could be considered unduly prejudicial to a defendant for a juror to read a newspaper summary of legally admissible evidence which

was heard in open court. Nor can it be deemed unduly prejudicial for the press to summarize inadmissible evidence which the jury heard, but was instructed to disregard.[11/] Generally, prejudicial evidence that is not admissible will have been screened out at pre-trial suppression hearings, and will not be presented in open court. Thus trials do not pose the "special risks" posed by pre-trial suppression hearings.

Of course, during a trial, the press could always report potentially prejudicial information it has itself obtained independently. But that kind of potentially prejudicial information does not result from public trials, and would not be prevented by closure.

---

11. It is unlikely, though arguable, that repeated exposure to the inadmissible evidence would unduly prejudice the jury even if the initial exposure did not. But even that possibility could be avoided by implementation of alternatives, including sequestration and voir dire. Ordinarily, of course, jurors are instructed at the beginning of a trial not to read anything about the trial until after they announce their verdict. If that routine instruction is obeyed, as it usually is, press coverage of the trial could not prejudice the jury.

Realistically, the only trial situation in which a defendant is likely to be unduly prejudiced is when the press summarizes evidence or argument presented in open court when the jury was not present. That risk, though small, can be eliminated or minimized by alternatives less drastic than closure.[12/]

3. During trials, judges have available many alternatives for protecting defendant's rights that are less drastic than closure of the entire trial.

The four justices who dissented in Gannett expressly placed on the defendant the burden of showing "a substantial probability that alternatives to closure will not protect adequately his right to a fair trial." 61 L.Ed.2d at 660. Justice Powell, concurring, agreed that the trial court should consider alternatives to closure, but placed on the public and the press the responsibility of showing

---

12. See note 11, supra. In addition, most of this kind of evidence or argument is, or can be, presented to the judge in chambers, or at a "bench conference."

to the court's satisfaction that "alternative procedures" are available that would eliminate prejudice to the defendant. Id. at 635. Amici believe the burden should be on the parties requesting closure; but regardless of where the burden is placed, at least five justices agree that closure is not constitutionally permissible if less drastic alternatives would protect the defendant's constitutional rights.[13/]

Many alternatives are available to trial and appellate courts to protect a defendant's right to a fair trial.[14/] Because some of the alternatives interfere, though to a lesser extent than closure of the entire trial, with the presumptively protected right of access, they should not routinely be employed. With that caution in mind, amici list here some of the less drastic alternatives that this and lower courts have utilized:

---

13. In the analogous context of "gag orders" on the press, at least four justices, and possibly five, agreed that gag orders would not be constitutionally permissible if less drastic alternatives would suffice. Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

14. See generally, Fenner and Skoley, "Rights of the Press and the Closed Court Criminal Proceeding," 57 Neb.L.Rev. 442, 493-515 (1978).

1. sequestration of jurors, Nebraska Press, 427 U.S. 539 at 564 (1976);
2. voir dire of jurors, Murphy v. Florida, 421 U.S. 794, 800-03 (1975);
3. change of venire, United States v. Holovachka, 314 F.2d 345 (7th Cir.), cert. denied, 374 U.S. 809 (1963);
4. change of venue, Irvin v. Dowd, 366 U.S. 717, 721 (1961);
5. enforcement of courtroom decorum, Sheppard v. Maxwell, 384 U.S. 333, 358 (1966);
6. instructions to the jury (including opening instructions not to read any press coverage, and closing instructions to disregard any inadvertently acquired information), Sheppard v. Maxwell, supra at 357-58;
7. control over courtroom personnel and officers of the court, Sheppard v. Maxwell, supra at 359;
8. limited closure to protect the identity of minors or other witnesses, e.g., Geise v. United States, 262 F.2d 151 (9th Cir. 1958);

9. mistrial, new trial, and reversal. See generally, Rules 29, 33, 47 and 48, Fed.R.Crim.Pro.

Those alternatives were not considered in this case. Accordingly, the narrow pre-trial holding in Gannett should not be extended herein to sanction the closure of the entire criminal trial.

II. EVEN ABSENT A CONSTITUTIONAL RIGHT OF PUBLIC ACCESS, THE PUBLIC HAS A SUFFICIENT INTEREST IN OPEN TRIALS TO REQUIRE THE EXPRESS CONSENT OF THE PROSECUTOR TO A CLOSURE MOTION.

Public scrutiny and discussion of judicial proceedings has always been considered a fundamental safeguard of the American criminal justice system. See, Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). Only by attending trials can the public receive that firsthand information regarding the workings of the criminal justice system necessary to appreciate and evaluate the performance of officials entrusted to administer justice, and necessary to protect the strong societal interest in fair and just proceedings. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975). Even the majority in Gannett recognized the strong public interest in open trials:

> There can be no blinking the fact that there is strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come

> forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system. (citations omitted.) 61 L.Ed.2d at 623.

The majority in Gannett explicitly compared the strong public interest in the public trial clause of the Sixth Amendment with the strong public interest in the jury trial clause of the Sixth Amendment, and noted that there is "great public interest in jury trials as the preferred mode of fact-finding in criminal cases...." Id. at 624.

Although the "public interest" in jury trials has not yet been held to confer a "constitutional right" in the public to insist upon jury trials, this Court has found that public interest to be sufficiently strong to preclude a defendant's attempt to waive his constitutional right to a jury trial unless the prosecutor, as the representative of the public, consents:

> "In an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation...Thus,...a defendant cannot waive a jury trial without the consent of the prosecutor...."

Id. at 624.[15] (citations omitted.) The public interest in open trials is no less strong than that in jury trials, and warrants similar protection.

The criminal prosecutor is not an ordinary party to a controversy, Singer v. United States, 380 U.S. 24 at 37 (1965). Although the prosecutor is the representative of the public interest, he or she must sometimes balance the public interest with potentially conflicting professional, personal, or political interests.[16] Thus, in the balancing process, the public interest may not always receive the protection it requires. In Gannett, as in the instant case, the balance resulted in prosecutorial acquiescence to the closure motion.[17] Such

---

15. In some states the public has elected, by statute, to eliminate any prosecutorial role in the decision to waive jury trial. E.g., New York Criminal Procedure Law §§ 320.10 and 340.40 (McKinney, 1971).

16. This is not to assume that prosecutors would acquiesce for an "ignoble purpose." Singer v. United States, 380 U.S. at 37.

17. In Gannett, the "district attorney did not oppose the motion." 61 L.Ed.2d at 619. In Richmond Newspapers, "the prosecutor
(FN 17 continued on next page)

non-objection would be deemed insufficient to waive the public's interest in jury trials; it should similarly be deemed insufficient to waive the public's interest in open trials.

Thus, even if the public and the press do not have a constitutional right of access to criminal trials and pre-trial proceedings, a defendant should not be able to waive his or her constitutional right to a public trial without the prosecutor's express consent.[18/]

---

interposed no objection, emphasizing that '[i]t's strictly on defense motion,...in the discretion of the Court.'" Jurisdictional Statement at 7 and App.D. at 7a.

18. Although the "public trial" clause of the Sixth Amendment does not, of itself, empower a defendant to compel a closed trial over a prosecutor's objection, in very rare circumstances, the defendant's constitutional right to a "fair trial" may empower a defendant to compel a closed trial, even over a prosecutor's objection, if the court finds closure is necessary to protect the defendant's right to a fair trial and less drastic alternatives will not suffice.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Virginia Supreme Court and should overrule Gannett v. DePasquale, or limit it to its facts.

Respectfully submitted,

EDNA D. WELLS
BRUCE J. ENNIS, JR.
American Civil
Liberties Union
22 East 40th Street
New York, New York 10016

STEPHEN BRICKER
American Civil
Liberties Union of
Virginia
1001 East Main Street
Richmond, Virginia 23219

Attorneys for Amici
Curiae*

---

*We wish to express our appreciation to law students Alyse Gray and Karen van Ingen, for their assistance in the preparation of this brief.